

CAUSE NO. 22-CV-0675

SALT & PEPPER RESTAURANTS, INC.

Plaintiff/Garnishor,

VS.

**TIGHT ENDS SPORTS BAR & GRILL, LLC
and TIMOTHY DUNGAN**

Defendants,

VS.

BANKSOUTH

Garnishee.

IN THE DISTRICT COURT

GALVESTON COUNTY, TEXAS

56th JUDICIAL DISTRICT

**PLAINTIFF’S OBJECTIONS TO DEFENDANTS’ EXHIBIT LIST AND EXHIBIT 1 TO
DEFENDANTS’ MOTION TO DISSOLVE WRIT OF GARNISHMENT
AND MOTION TO STRIKE**

Plaintiff Salt & Pepper Restaurants, Inc. (“***Plaintiff***”) files these Objections to Defendants Tight Ends Sports Bar & Grill, LLC (“***Tight Ends***”) and Timothy Dungan’s (“***Dungan***”) (collectively, “***Defendants***”) Exhibit List and Exhibit 1 to Defendants’ Motion to Dissolve Writ of Garnishment and Motion to Strike and, in support thereof respectfully states as follows:

BACKGROUND

On July 22, 2022, Defendants filed a Motion to Dissolve Writ of Garnishment. On July 25, 2022, Defendants filed an Amended Motion to Dissolve Writ of Garnishment (the “***Motion***”) and set the Motion for hearing by submission on July 28, 2022. On July 28, 2022, Defendants filed an Exhibit List and a single screenshot of what appears to be a summary of several bank accounts.¹ Accompanying the exhibit list is a business record declaration executed by Timothy Dungan (the “***Dungan Declaration***”).

¹ A true and correct copy of the Exhibit List is attached hereto as Exhibit A.

To date, Defendants have represented to this Court that they were “just made aware of the garnishment by the garnishee,” and that the consequences of the garnishment have been severe (so much so that Dungan allegedly had to mortgage his home). *See* Defs. Mot. for Leave at ¶ 3. Now, however, Tight Ends has submitted a screenshot of several bank accounts containing well over \$500,000.00, calling into question the veracity of Defendants’ previous arguments. Nevertheless, like much of the other evidence submitted in connection with the Motion, the Dungan Declaration is deficient, does not satisfy Texas Rule of Evidence 902(10), and cannot be considered competent evidence. The screenshot attached to the declaration is likewise inadmissible, and the Court should refuse to consider it.

OBJECTIONS TO PETITIONERS’ EVIDENCE

Plaintiff objects to the screenshot attached to the Dungan Declaration because it constitutes inadmissible hearsay under Texas Rule of Evidence 801. Plaintiff likewise objects to the Dungan Declaration itself because it is not a competent business records affidavit under Texas Rule of Evidence 902(10), namely because Dungan is not a custodian of records for Prosperity Bank. In order to introduce business records authored or created by a third party, the proponent must establish three factors: (a) the document is incorporated and kept in the course of the testifying witness’s business; (b) that business typically relies upon the accuracy of the contents of the documents; and (c) the circumstances otherwise indicate the trustworthiness of the document. *Lewis v. Absolute Resolutions VII, LLC*, No. 04-17-00447-CV, 2018 WL 3261197, at *2 (Tex. App.—San Antonio July 5, 2018, no pet.).

Here, the screenshot attached to the Dungan Declaration is plainly not a “record.” It is unlikely that Tight Ends keeps screenshots of account balances in its regular course of business. Additionally, the circumstances do not indicate the trustworthiness of the document, especially

considering it is unclear what **date or time** the screenshot was taken. Finally, the Dungan Declaration does not identify the date, time, or method of accessing the account information shown in the screenshot. In short, the screenshot is not a business record, the Dungan Declaration is deficient, and Plaintiff therefore requests that the Court sustain these objections and decline to consider the screenshot as competent evidence.

MOTION TO STRIKE

In addition to and on the same grounds as the objections recited above, Plaintiff moves to strike the Dungan Declaration and the exhibit attached thereto. *See* TEX. R. EVID. 103 (stating that a timely motion to strike evidence preserves error caused by its improper admission).

CONCLUSION

Plaintiff Salt & Pepper Restaurants, Inc. respectfully requests that the Court sustain its objections and strike the objectionable portions of Defendants' purported evidence as described herein, along with any such other and further relief to which it may be justly entitled.

Respectfully submitted,

GRAY REED

By: /s/ Preston T. Kamin

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**ATTORNEYS FOR PLAINTIFF SALT
& PEPPER RESTAURANTS, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly furnished to the following counsel of record electronically through the electronic filing manager (www.efiletexas.gov) on this 29th day of July, 2022 as follows:

John P. Henry
jhenry@jhenrylaw.com
407 West Liberty Street
Round Rock, Texas 78664
(512) 981-7301
Attorney for Defendants

/s/ Preston T. Kamin

Preston T. Kamin

EXHIBIT A

Filed: 7/28/2022 3:28 PM
JOHN D. KINARD - District Clerk
Galveston County, Texas
Envelope No. 66773207
By: Shailja Dixit
7/28/2022 3:31 PM

Defendants' Exhibit List and Exhibit 1 for Defendants' Motion to Dissolve Writ of Garnishment

CAUSE NO. 22-CV-0675

SALT & PEPPER RESTAURANTS, INC.,	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	
v.	§	GALVESTON COUNTY, TEXAS
	§	
TIGHT ENDS SPORTS BAR & GRILL, LLC	§	
and TIMOTHY DUNGAN,	§	
Defendants	§	56th JUDICIAL DISTRICT

EXHIBIT LIST – DEFENDANTS’ MOTION TO DISSOLVE WRIT OF GARNISHMENT

1. Business Record Declaration.

Respectfully submitted,

John Henry & Associates, PLLC

/s/ John P. Henry

John P. Henry

State Bar No. 24055655

407 West Liberty Street

Round Rock, Texas 78664

(512) 981-7301

jhenry@jhenrylaw.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on the parties listed below on this 28th day of July, 2022.

/s/ John P. Henry
John P. Henry

Preston Kamin
Gray Reed
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
ATTORNEYS FOR PLAINTIFF
VIA ELECTRONIC SERVICE and
EMAIL pkamin@grayreed.com

CAUSE NO. 22-CV-0675

SALT & PEPPER RESTAURANTS, INC.,
Plaintiff

v.

TIGHT ENDS SPORTS BAR & GRILL, LLC
and TIMOTHY DUNGAN,
Defendants

§
§
§
§
§
§
§

IN THE DISTRICT COURT

GALVESTON COUNTY, TEXAS

56th JUDICIAL DISTRICT

BUSINESS RECORD DECLARATION

1. My name is Timothy Dungan. I am a defendant in this case, as is Tight Ends Sports Bar & Grill, LLC, an entity in which I have an ownership interest and of which I am the manager member and chief executive officer.

2. I am over the age of 18 and competent to testify to the matters stated in this *Business Record Declaration*.

3. This declaration is made on personal knowledge and every statement in it is true and correct.

4. I am also the custodian of records of Tight Ends Sports Bar & Grill, LLC and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.

5. Attached is 1 page of records. This is the original record or an exact duplicate of the original record.

6. The record was made at or near the time of each act, event, condition, opinion, or diagnosis set forth.

7. The record was made by, or from information transmitted by, persons with knowledge of the matters set forth. Specifically, this record was made from information

transmitted from Prosperity Bank, a Texas bank headquartered in Houston with locations throughout Texas.

8. The record is incorporated and kept in the course of regularly conducted business activity, and it is the regular practice of the business activity to make the record. Specifically, Tight Ends often enquires about its current account balances with Prosperity Bank and receives written balance information in response. These records are incorporated by Tight Ends and kept in the course of regularly conducted business activity.

9. Tight Ends typically relies upon the accuracy of the content of documents from the bank in order to allocate its capital and maintain positive cash flow.

10. Circumstances indicate the trustworthiness of the record, where I logged in to my account using my secure username and password in order to check my account balance information and the record in question was produced in direct response by Prosperity Bank's application (with which I regularly interact) and saved to my device.

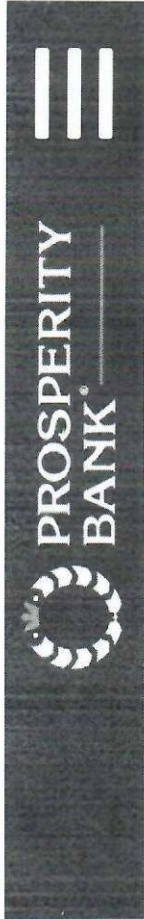
11. Finally, I verified the facts contained in the record by logging in to my secure account application with the bank. The balances were the same.

12. My name is Timothy Dungan. My date of birth is May 8, 1968, and my address is 1603 Wildfire Lane, Frisco, TX 75033. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Dallas County, Texas, on the 28th day of July, 2022.

A handwritten signature in black ink, appearing to read 'Timothy Dungan', written over a horizontal line.

Timothy Dungan



Deposit Accounts

TX C RYALCKG x8339

Available Balance

Current Balance



TIMOTHY M DUNGAN

TX C SMPLY FREE x8371

Available Balance

Current Balance



TIMOTHY M DUNGAN

TX C SMPLY FREE x8363

Available Balance

Current Balance



TIMOTHY M DUNGAN

TIGHT ENDS SPORTS BAR & GRILL

x7432

Available Balance

\$595,981.07

Current Balance

\$1,501,139.98

TIGHT ENDS SPORTS BAR & GRILL LLC

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

John Henry on behalf of John Henry

Bar No. 24055655

jhenry@jhenrylaw.com

Envelope ID: 66773207

Status as of 7/28/2022 3:32 PM CST

Associated Case Party: Salt & Pepper Restaurants, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Preston TKamin		pkamin@grayreed.com	7/28/2022 3:28:00 PM	SENT
Tyler J.McGuire		tmcguire@grayreed.com	7/28/2022 3:28:00 PM	SENT

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John Henry on behalf of John Henry

Bar No. 24055655

jhenry@jhenrylaw.com

Envelope ID: 66773207

Status as of 7/28/2022 3:32 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jackie Kish		jkish@grayreed.com	7/28/2022 3:28:00 PM	SENT

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Jackie Kish on behalf of Preston Kamin

Bar No. 24062817

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Status as of 7/29/2022 2:33 PM CST

Associated Case Party: Salt & Pepper Restaurants, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Preston TKamin		pkamin@grayreed.com	7/29/2022 2:22:52 PM	SENT
Tyler J.McGuire		tmcguire@grayreed.com	7/29/2022 2:22:52 PM	SENT
Justin R.Cowan		jcowan@grayreed.com	7/29/2022 2:22:52 PM	SENT

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Jackie Kish on behalf of Preston Kamin

Bar No. 24062817

jkish@grayreed.com

Envelope ID: 66809067

Status as of 7/29/2022 2:33 PM CST

Associated Case Party: Tight Ends Sports Bar & Grill, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
John Henry		jhenry@jhenrylaw.com	7/29/2022 2:22:52 PM	SENT